

VITHAL KUMAR JAYARAMAN

A

v.

AZMAN MD NOR

COURT OF APPEAL, PUTRAJAYA

B

LOW HOP BING JCA

KN SEGARA JCA

RAMLY ALI JCA

[APPEAL NO: B-03-2-2008]

30 SEPTEMBER 2009

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CIVIL PROCEDURE: *Admission - Judgment on admission, application for - Whether admission may be in the pleadings or otherwise - Whether admission must be a clear admission - Whether failure to plead admission fatal - Rules of the High Court 1980, O. 27 r. 3*

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CIVIL PROCEDURE: *Judgment - Admission - Judgment on admission of facts - Circumstances when such judgment may be entered - Rules of the High Court 1980, O. 27 r. 3*

WORDS & PHRASES: *'or otherwise' - Rules of the High Court 1980, O. 27 r. 3 - Whether 'or otherwise' confines admissions of fact to pleadings only*

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The plaintiff granted the 1st defendant several friendly loans pursuant to written and oral agreements. The 1st defendant defaulted and the plaintiff commenced civil proceedings against the defendants. The 1st defendant did not deny receiving the plaintiff's monies but contended that these monies represented the plaintiff's investments in his (the 1st defendant's) company. The 1st defendant also claimed the existence of a collateral contract between the 1st defendant and the plaintiff. The plaintiff subsequently filed an application to enter judgment under O. 27 r. 3 of the Rules of the High Court 1980 ('RHC 1980') against the 1st defendant. The senior assistant registrar allowed the application. The 1st defendant's appeal to the judge in chambers was dismissed with costs and thus he appealed to the Court of Appeal.

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Held (dismissing the appeal with costs)

Per Ramly Ali JCA:

(1) Order 27 r. 3 of the RHC 1980 enables a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim. Order

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- A 27 r. 3 relates to admissions of fact whether in the pleadings or otherwise. The admission must be a clear admission. *Ellis v. Allen* (refd); *Low Yoke Lan v. Ng Ooi Kiat* (refd); *Carabao Export Pty Ltd. v. Online Management Consultants Sdn Bhd & Ors* (refd). (paras 12, 13 & 14)
- B (2) The words ‘or otherwise’ in O. 27 r. 3 of the RHC are of general application. They justify the making of an order or judgment where an admission is made by letter or other relevant documents which clearly show that the defendant has no defence to the plaintiff’s claim. The words do not refer to admissions contained in pleadings alone. The failure to plead an admission is not fatal. It is not essential that an admission, which relates to and is governed by the rules of evidence, be pleaded. *Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction and Engineering Works* (refd); *Folin & Brothers Sdn Bhd (in Receivership) v. Wong Foh Ling & Ors.* (foll); *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* (refd); *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* (foll). (paras 15, 16, 17 & 18)
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- E (3) In the instant case, after reading the relevant documents – the two loan agreements and the 1st respondent’s handwritten letter to the plaintiff – the Court of Appeal was more than convinced that there was a clear unequivocal admission by the first defendant of his indebtedness to the plaintiff in respect of his claim. The documents clearly showed that the monies were loans given by the plaintiff to the first defendant pursuant to loan agreements with clear undertakings from the first defendant to repay the amounts borrowed within the stipulated time. The issue of the collateral oral agreement between the parties as raised by the 1st defendant was baseless. (para 28)
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- H (4) The 1st defendant had no defence to the action and the plaintiff was thus able to obtain judgment under O. 27 r. 3 of the RHC 1980. All the relevant issues to establish the plaintiff’s claim against the 1st defendant had been sufficiently proved by the admissions thereby enabling the plaintiff to obtain the judgment as claimed. (para 30)
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Bahasa Malaysia Translation Of Headnotes

A

Plaintif telah memberi defendan pertama beberapa pinjaman persahabatan mengikut perjanjian-perjanjian bertulis dan lisan. Defendan pertama ingkar dan plaintif memulakan prosiding sivil terhadap defendan-defendan. Defendan pertama tidak menafikan menerima wang plaintiff tetapi mendakwa bahawa wang itu melambangkan pelaburan plaintiff dalam syarikat beliau (defendan pertama). Defendan pertama juga mendakwa kewujudan satu kontrak kolateral di antara defendan pertama dan plaintif. Plaintif kemudiannya memfail sesuatu permohonan untuk mencatatkan penghakiman di bawah A. 27 k. 3 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT 1980') terhadap defendan pertama. Penolong pendaftar kanan membenarkan permohonan itu. Rayuan defendan pertama ke hakim dalam kamar telah ditolak dengan kos dan, oleh itu, beliau merayu ke Mahkamah Rayuan.

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Diputuskan (menolak rayuan dengan kos)**Oleh Ramly Ali HMR:**

- (1) Aturan 27 k. 3 KMT 1980 membolehkan satu pihak memperoleh penghakiman dengan cepat di mana pihak lain telah membuat pengakuan nyata yang menyebabkan pihak yang pertama berhak berjaya dalam tuntutan. Aturan 27 k. 3 berhubung dengan pengakuan fakta-fakta sama ada dalam pliding-pliding atau sebaliknya. Pengakuan itu semestinya satu pengakuan yang jelas. *Ellis v. Allen* (dirujuk); *Low Yoke Lan v. Ng Ooi Kiat* (dirujuk); *Carabao Expert Pty Ltd. v. Online Management Consultants Sdn Bhd & Ors* (dirujuk).
- (2) Perkataan-perkataan 'atau sebaliknya' di dalam A. 27 k. 3 KMT 1980 digunakan secara am. Mereka memberikan justifikasi bagi pembuatan sesuatu perintah atau penghakiman di mana satu pengakuan dibuat oleh surat atau dokumen-dokumen relevan lain yang jelas membuktikan bahawa defendan tidak mempunyai pembelaan terhadap tuntutan plaintif. Perkataan-perkataan itu tidak merujuk kepada pengakuan-pengakuan yang dikandung dalam pliding-pliding sahaja. Kegagalan untuk memplid sesuatu pengakuan tidaklah fatal. Ia tidak perlu bagi sesuatu pengakuan, yang berkaitan dengan dan ditentukan oleh kanun-kanun keterangan, untuk diplid. *Pembinaan KSY Sdn Bhd v. Syarikat*

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- A *Federal Furniture Construction and Engineering Works* (dirujuk); *Folin & Brothers Sdn Bhd (in Receivership) v. Wong Foh Ling & Ors.* (diikuti); *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* (dirujuk); *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* (diikuti).
- B (3) Dalam kes semasa, setelah membaca dokumen-dokumen yang relevan – kedua-dua perjanjian pinjaman dan surat responden pertama yang ditulis tangan kepada plaintif – Mahkamah Rayuan amat berpuas hati bahawa terdapat pengakuan yang jelas dan nyata oleh defendan pertama mengenai keterhutangannya kepada plaintif berhubung dengan tuntutan. Dokumen-dokumen jelas menunjukkan bahawa wang itu merupakan pinjaman-pinjaman yang diberi oleh plaintif kepada defendan pertama mengikuti perjanjian-perjanjian pinjaman dengan akujanji-akujanji jelas dari defendan pertama untuk membayar balik amaun yang dipinjam dalam masa yang telah distipulasikan. Isu perjanjian kolateral lisan di antara pihak-pihak seperti yang dibangkitkan oleh defendan pertama tiada asas langsung.
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- E (4) Defendan pertama tidak ada pembelaan terhadap tindakan tersebut dan plaintif, oleh itu, dapat memperolehi penghakiman di bawah A. 27 k. 3 KMT 1980. Semua isu-isu relevan untuk menetapkan tuntutan plaintif terhadap defendan pertama telah dibuktikan dengan cukup oleh pengakuan-pengakuan tersebut, dan dengan itu membolehkan plaintif memperolehi penghakiman seperti dituntut.
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Case(s) referred to:

- Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd & Ors* [1988] 1 LNS 88 HC (**refd**)
- G *Ellis v. Allen* [1914] 1 Ch 904 (**refd**)
- Folin & Brothers Sdn Bhd (in Receivership) v. Wong Foh Ling & Ors* [1991] 1 CLJ 743; [1991] 2 CLJ (Rep) 609 HC (**fol**)
- Low Yoke Lan v. Ng Ooi Kiat* [2001] 1 LNS 338 HC (**refd**)
- Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* [1970] 2 MLJ III (**refd**)
- H *Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 CLJ 678; [1991] 1 CLJ (Rep) 346 SC (**refd**)
- Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* [1995] 3 CLJ 610 HC (**fol**)

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Legislation referred to:

Rules of the High Court 1980, O. 27 r. 3

For the appellant/1st defendant - Prakash Lachimanan; M/s Mathews Hun Kandiah

For the respondent/plaintiff - Nachamnai Kumarappan; M/s Noor Nilam & Assoc

[Appeal from High Court, Shah Alam; Suit No: MT1-22-161-2005]

Reported by Andrew Christopher Simon

JUDGMENT**Ramly Ali JCA:**

[1] The plaintiff's claim against the 1st defendant is premised on a breach of friendly loans for a sum of RM468,500 claimed to have been given to the 1st defendant over a period between July 2000 and February 2002 pursuant to several written agreements dated 30 June 2000, 5 December 2000 and 2 February 2002 and oral agreement between them. On top of that the plaintiff also claimed for interest at the rate of 8% per annum from 23 December 2004 until full satisfaction.

[2] The first loan agreement is dated 30 June 2000 whereby the plaintiff on request of the 1st defendant, had given a friendly loan of RM100,000 to the 1st defendant and the 1st defendant had agreed to repay the said loan within (90) days from the date of the said first agreement.

[3] The second loan agreement between the same parties is dated 5 December 2000 whereby, the plaintiff again, on request of the 1st defendant had given another friendly loan of RM300,000 to the 1st defendant. This time the 1st defendant had agreed to repay the said loan within (6) months from the date of the said second agreement. For this second loan, the 2nd defendant had executed a personal guarantee to guarantee the due repayment of the said second loan by the 1st defendant as stipulated in the second agreement.

[4] The third loan of RM28,500 was given by the plaintiff to the 1st defendant sometime in June 2001 on an oral request made by the 1st defendant, whereby the 1st defendant had agreed to repay the amount within three months from June 2001.

- A [5] Subsequent to that the 1st defendant had orally requested for another loan from the plaintiff for a sum of RM40,000. This fourth loan was given by the plaintiff to the 1st defendant sometimes in February 2002. For this loan the 1st defendant promised to repay it within three months from February 2002.
- B [6] Altogether the total amount of friendly loan given by the plaintiff to the 1st defendant was RM468,500. To this effect, the same parties had entered into another agreement dated 2 February 2002 whereby the 1st defendant had acknowledged having taken
- C from the plaintiff the said loan amounting to RM468,500 during the period between July 2000 and February 2002 and had agreed to pay the loan in full.
- D [7] However, the 1st defendant had failed to repay the said loan as agreed earlier. Relevant notices of demand were issued by the plaintiff's solicitors to the 1st and 2nd defendants demanding for repayment of the said loan. Both the 1st and 2nd defendants have failed to comply with the said notices of demand.
- E [8] The plaintiff filed his writ and statement of claim against both the defendants on 4 March 2005. On 31 May 2005 the plaintiff filed an application to enter judgment under O. 27 r. 3, of the Rules of the High Court 1980 (RHC 1980) against the 1st defendant.
- F [9] After an exchange of affidavits between the parties, the learned senior assistant registrar (SAR) allowed the plaintiff's application under O. 27 r. 3 of RHC 1980 on 14 July 2006. Being dissatisfied with the learned SAR's decision, the 1st defendant appealed to the judge in chambers. On 29 October 2007, the learned Judicial
- G Commissioner dismissed the 1st defendant's appeal with costs. Hence the present appeal before this court.
- H [10] The 1st defendant (the appellant in this appeal) in his defence denied borrowing any money from the plaintiff. His contention is that the monies were for the plaintiff's investment in the 1st defendant's company, namely Voiceworkz Sdn Bhd and that parties were actually bound by the terms of an oral collateral agreement between them.

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[11] The 1st defendant alleged that it was orally agreed in principle between them that the plaintiff would inject capital as and when required by the said company. The 1st defendant claimed that the various loan agreements executed by him and the plaintiff were mere façade and that the plaintiff's attempt to enforce those loan agreements by filing the suit was done in bad faith ie, seeking to recover investments he has lost.

Order 27 r. 3 Of The RHC 1980

[12] Order 27 r. 3 of the RHC 1980 deals with judgment on admission of facts. In full it reads as follows:

Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

[13] The object of the above rule is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim (see: *Ellis v. Allen* [1914] 1 Ch 904 at p. 909 and *Low Yoke Lan v. Ng Ooi Kiat* [2001] 1 LNS 338).

[14] This rule relates to admissions of fact, whether in the pleadings or otherwise. The admission must be a clear admission, and not simple evidence of some facts upon which the plaintiff would have to rely to establish his cause of action. (see: *Carabao Exports Pty Ltd. v. Online Management Consultants Sdn Bhd & Ors* [1988] 1 LNS 88).

[15] The words "or otherwise" in the said rule are of general application and justify the making of an order or judgment where an admission is made by letter or other relevant documents or agreements which clearly show that the defendant has no defence to the plaintiff's claim. They are not confined to admissions contained in the pleadings alone (see: *Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 CLJ 678; [1991] 1 CLJ (Rep) 346 – Supreme Court).

- A [16] In *Folin & Brothers Sdn Bhd (in Receivership) v. Wong Foh Ling & Ors.* [1991] 1 CLJ 743; [1991] 2 CLJ (Rep) 609, Zakaria Yatim J held:

B Under O. 27 of RHC 1980, admissions may be made in the pleadings or otherwise; the word “or otherwise” including an admission made by letter stating facts which show the defendant has no defence to the action.

- C [17] The above principle was adopted and followed in the case of *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* [1970] 2 MLJ III; as well as in *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* [1995] 3 CLJ 610, where Low Hop Bing J (now JCA) had also ruled:

D There is no merit in the contention that Order 27 only applies when an action has already commenced. There is abundant authority to support the proposition that the Courts can consider and decide on the admissions made before or after legal proceedings have been commenced.

- E [18] In the same case, Low Hop Bing J went on to stress that the failure to plead the admission is not fatal; and hence it is not essential that an admission, which relates to and is governed by the rules of evidence, be pleaded. This court is in total agreement with these rulings, by the learned judge.

- F [19] The 1st defendant’s defence to the plaintiff’s claim is that the said monies claimed by the plaintiff were not loans or borrowings to the 1st defendant as alleged by the plaintiff, but were investment by the plaintiff in the company called Voiceworkz Sdn Bhd; thus the plaintiff cannot recover when the investment has lost. The 1st defendant did not deny receiving the monies, not as loans but as the plaintiff’s investment in the said company. The 1st defendant submitted that the defence as pleaded does not contain any admission as otherwise alleged by the plaintiff.

- G [20] The issue to be determined in this case is whether the monies were loans or borrowings given by the plaintiff to the 1st defendant pursuant to friendly loan arrangements as alleged by the plaintiff or whether they were investments in the company, Voiceworkz Sdn Bhd as alleged by the 1st defendant.

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[21] In determining the issue, the court has to consider the circumstances of the case, particularly when and how the monies were given by the plaintiff to the 1st defendant. Relevant documents must be considered. These documents may have been in existence before the action was commenced in court. As clearly held by Low Hop Bing J in *Tom Monies Enterprise Sdn Bhd (supra)*, there is abundant authority to support the proposition that the court can consider and decide on the admissions made before any legal proceedings have been commenced.

[22] The first document to be considered is the “Loan Agreement” dated 5 December 2000 entered into between the 1st defendant (referred to as the borrower) and the plaintiff (referred to as the lender). These descriptions of “the borrower” and “the lender” appear expressly in the preamble to the said agreement. The relevant part of the said agreement states:

The lender has(sic) agreed to loan a sum of RM300,000 (Ringgit Malaysia Three Hundred Thousand only) to the borrower. (Public Bank Berhad bearing cheque no 535101 dated 5.12.2000 and Public Bank Berhad bearing cheque no S12015 dated 20.6.2009. The borrower has agreed to pay back the loan within 6 (six) months from the date of this agreement.

Further down the same paragraph, the agreement provides: “This document holds good in the Courts of Law of Malaysia”.

[23] The second document to be considered is another “Loan Agreement” dated 2 February 2002, entered into between the plaintiff and the 1st defendant. This particular loan agreement was prepared and drafted personally by the 1st defendant. Even though the document is entitled “Loan Agreement”, the preamble refers the document as “This Letter”. There is no indication to show that the said document/letter is on a “without prejudice” basis. No such wordings appear therein. The full contents of the said document/letter are reproduced below:

This letter dated the 2nd of February 2002 is to state that I, Vithal Kumar a/l Jayaraman bearing NRIC No. 721025-14-5645 (herein known as the borrower) residing at 166-3-7 Kiara Park Condo, Jalan Burhanuddin Helmi, Taman Tun Dr. Ismail, 60000 Kuala Lumpur have taken loans on various occasions from Encik Azman Mohd Nor bearing NRIC No. 620610-05-5007 (herein known as the lender) residing at No. 50 Jalan PJS 9/18, Bandar Sunway, 46150 Petaling Jaya, Selangor for which the details are as below:

- A On July 2000: RM100,000
 On December 2000: RM200,000
 On April 2001: RM50,000
 On May 2001: RM50,000
- B On June 2001: RM25,000
 On June 2001: RM3,500
- On February 2002: RM40,000 (the monthly bank interest on
C this amount is to be serviced by the borrower until full settlement is
 obtained

Total borrowings to date: RM468,500

- These loans were taken to fulfill business obligation of Voiceworkz
D Sdn Bhd (506445-H). These loan would be returned in full in due
 time. These loans were given purely based on mutual trust &
 understanding by both parties and will be honoured in those terms.

- E [24] The third relevant document to be considered is the
 handwritten letter dated 28 December 2004 from the 1st defendant
 personally (signed by the 1st defendant in his personal capacity) to
 the plaintiff immediately after receiving notice of demand from the
 plaintiff's solicitor. The said three-page handwritten letter is not
 marked "without prejudice".

- F [25] The relevant parts of the said letter are reproduced letter:

 First and foremost I apologise for not being able to pay the money
 that I owe you ... Azman, I have the intention of paying you back
 and that's without doubt.

- G Azman, I know you have been patient but please just grant me one
 appointment with you for me to apologise and make good my
 words. This time things are going ok and I will be able to make the
 payments to you in installments.

- H Azman, I would like to pay off by the end of 2005 and work out a
 payment schedule whereby I will start paying you at the end of
 March.

- I Azman, you have been patient with me for four years, all I ask is
 another three more months. If you do not have faith in my words
 we would draft out a lawyer's letter ...

Azman, if I have to beg you, I will, please give one more chance and I will make good my words.

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[26] The letter ended in the following words:

All I ask for is a little more time three months to be exact and I will start issuing cheques to you or your lawyers.

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Thank you.

Yours faithfully

(signed)

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...

Kumar

[27] This letter is not a “without prejudice” letter. It was written personally by the 1st defendant after receiving a notice of demand from the plaintiff’s solicitors. It is not a letter written as part of an ongoing negotiation by the parties for settlement. Thus, this letter may be admitted as evidence to show what actually transpired between the parties in the transaction. In any event, the issue relating to admissibility of this letter was determined by the learned senior assistant registrar on 2 December 2005 where it was decided that the letter is admissible for the purpose of the application. There is no appeal filed against that decision. Therefore the decision stands.

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[28] After reading all the three documents, the court is more than convinced that there was a clear and unequivocal admission by the 1st defendant of his indebtedness to the plaintiff in respect of the claim. The contents of the letters/documents clearly show that the monies in question were loans or borrowings given by the plaintiff to the 1st defendant pursuant to loan agreements with clear undertaking from the 1st defendant to repay the amount taken within the stipulated time. The admission relates to issue of fact ie, that the 1st defendant borrowed the amount in question from the plaintiff and thereafter has failed to repay as promised by him. The issue of collateral oral agreement between the parties as raised by the 1st defendant is baseless. The 1st defendant had failed to substantiate the claim to defeat the clear admission as contained in all the relevant documents.

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- A [29] The counsel for the 1st defendant before this court submitted that the said letter dated 28 December 2004 should not be admitted on the ground that the said letter was written by the 1st defendant without obtaining any legal advice. The court cannot accept this argument. It does not hold water. One does
- B not require any legal advice to write such a letter, particularly so when the 1st defendant is highly educated, and a doctor by profession. There is no highly technical or legalistic approach in the letter. The contents are sincere expression of an innocent individual who has failed to repay loans taken from a friend and
- C requested for more time. The contents are purely questions of fact originating from a person based on his own personal knowledge about the transaction. In short, a person need not get legal advice just to tell the truth, from his own heart.
- D [30] With the admissions (based on the three documents) the court is satisfied the 1st defendant has no defence to the action and the plaintiff is able to obtain judgment under O. 27 r. 3, RHC 1980. The admissions alone manage to fulfil the evidential requirements for the plaintiff to establish his claim against the 1st
- E defendant. Thus, judgment may be given without having to wait for the determination of any other question between the parties. Is not necessary for the action to go for full trial. All the relevant issues to establish the plaintiff's claim against the 1st defendant have sufficiently been proved by the said admissions, to enable the
- F plaintiff to obtain judgment as claimed. Therefore, there is no question that the said admissions are inextricably intertwined with the issues at trial, as argued by the counsel for the 1st defendant.

Conclusion

- G [31] Based on the above considerations the court is satisfied that the judgment for the plaintiff under O. 27 r. 3 of RHC 1980 granted by the learned senior assistant registrar, (which was later affirmed by the learned Judicial Commissioner) is right and proper. There is no justification for any interference at this stage. Therefore
- H the court unanimously dismissed the appeal with costs of RM3,000 to be paid to the respondent (plaintiff). The order of the High Court is affirmed. Deposit to the account of fixed costs.

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